APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-7414

FARMERS HOME ADMINISTRATION, ETC.,
Plaintiff-Appellee,

v.

JAMES I. MUIRHEAD, *et al.*,
Defendants.

JAMES I. MUIRHEAD, *et al.*,
Defendants-Third Party
Plaintiffs-Appellants,

v.

SEA LANDS, INC.,
Third Party
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

Jan. 24, 1995

Before POLITZ, Chief Judge, JONES, Circuit Judge, and FULLAM*, District Judge.

EDITH H. JONES, Circuit Judge:

The question in this case is whether the Farmers Home Administration, a federal agency, may be barred by state statute from enforcing its lien on Mississippi property, when the statutory bar arises from FmHA's untimeliness. Consistent with other federal courts of appeals, we hold that it may not be so barred. Unlike those other courts, however, we consider this a problematic result.

During 1979 and 1980, the Muirhead defendants executed promissory notes in favor of the Farmers Home Administration (FmHA) that were secured by deeds of trust on properties located in Mississippi. In April 1982, FmHA sent the Muirheads notices of acceleration declaring all of the promissory notes immediately due and payable. A second notice of acceleration and demand for payment was sent to the Muirheads in May 1985.

FmHA prepared to initiate foreclosure proceedings on the deeds of trust in October 1991 and brought this action to reform one of the deeds. The Muirheads answered and counterclaimed that under Mississippi law, none of the liens was enforceable because the statute of limitations had run on each of the underlying notes. While this action was pending, the properties covered by the deeds of trust—except for the property at issue in the reformation action—were sold by FmHA at a foreclosure sale. As a result, the Muirheads amended their counterclaim to set aside the sales.

The district court granted the government's motions to dismiss the counterclaim and for summary judgment. The court concluded that, while FmHA may have been time-barred by federal law, 28 U.S.C. § 2415(a) (1988),

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* District Judge of the Eastern District of Pennsylvania, sitting by designation.

from bringing an action on the notes, the government was not barred by limitations from bringing a foreclosure action.[1] We have reviewed the judgment of the district court and AFFIRM.[2]

Under a nationwide federal loan program like that of FmHA, it is settled that federal law ultimately controls the government's rights and responsibilities. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). Where no specific federal statute or regulation governs the matter at hand, federal courts must "fill the interstices of federal legislation 'according to their own standards.'" *Id.* at 727, 99 S.Ct. at 1458 (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943)). Normally, however, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Myers v. FDIC*, —— U.S. ——, ——, 114 S.Ct. 2048, 2054, 129 L.Ed.2d 67 (1994).

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[1] Section 2415(a) provides in relevant part:

> [E]very action for money damages brought by the United States . . . which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues. . . .

28 U.S.C. § 2415(a) (1988). For purposes of the motion to dismiss and for summary judgment, the district court assumed that the six-year limitations period had in fact run.

[2] In reviewing a 12(b)(6) dismissal, the court accepts all well pleaded averments as true, viewing them in the light most favorable to the nonmovant. *See Cooper v. Sheriff, Lubbock County*, 929 F.2d 1078, 1082 (5th Cir.1991). The dismissal should not be upheld unless it appears beyond doubt that the Muirheads can prove no set of facts which would entitle them to relief. *See id.* Since the Muirheads conceded below that the government's motion for summary judgment on its complaint for reformation should be granted if the court granted FmHA's motion to dismiss, we appropriately focus our review on the 12(b)(6) dismissal of the amended counterclaim.

Applying these principals to determine whether FmHA's foreclosure action against the Muirheads' property was barred by state law is a matter of characterization. To the federal government, the Muirheads' state law argument artfully dodges the essential fact that they would impose a state time bar upon the FmHA's remedy of foreclosure. A time bar, in the view of FmHA and other court decisions,[3] is a statute of limitations. State statutes of limitations do not, however, run against the federal government. *United States v. Summerlin,* 310 U.S. 414, 416, 60 S.Ct. 1019, 1020, 84 L.Ed 1283 (1940).[4] This ancient prerequisite of federal sovereignty constitutes a specific rule of decision that renders nugatory the federal courts' duty to select a federal rule or adopt state law as the rule of decision. *See Kimbell Foods, Inc., supra.* In the terms of *O'Melveny, supra,* if

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[3] *United States v. Alvarado,* 5 F.3d 1425, 1430 (11th Cir.1993); *Westnau Land Corp. v. United States Small Business Admin.,* 1 F.3d 112, 115 (2d Cir.1993); *United States v. Dos Cabezas Corp.,* 995 F.2d 1486, 1490 (9th Cir.1993) (in dicta); *United States v. Ward,* 985 F.2d 500, 502 (10th Cir.1993); *but see United States v. Thornburg,* 835 F.Supp. 543 (E.D.Cal.1993).

[4] *See also Guaranty Trust Co. v. U.S.,* 304 U.S. 126, 132, 58 S.Ct. 785, 788, 82 L.Ed. 1224 (1938); *Board of Jackson Cty. Comm'rs. v. U.S.,* 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313 (1939); *United States v. John Hancock Mut. Life Ins. Co.,* 364 U.S. 301, 81 S.Ct. 1, 5 L.Ed.2d 1 (1960); *United States v. California,* —— U.S. ——, ——, 113 S.Ct. 1784, 1790-91, 123 L.Ed.2d 528 (1993).

In *U.S. v. California, supra,* the Court noted that in *Summerlin* and in *Board of Comm'rs,* the right at issue [that was not barred by a state limitation statute] was obtained or created by a federal statute, and in *John Hancock,* there was a federal limitations period, and in each of those cases, "the Government was proceeding in its sovereign capacity." —— U.S. at ——, 113 S.Ct. at 1791. The Court then states that, "whether in general a state-law action brought by the United States is subject to a federal or state statute of limitations is a difficult question." *Id.* Because SBA's "state-law action" to foreclose arose from a federal loan program and SBA was proceeding "as the sovereign", the "difficult question" noted by the Court is not present here.

this is a statute of limitations case, there is no matter left unaddressed by federal law that must be supplemented by a state rule of decision.

The Muirheads naturally resist the reduction of their position to a statute of limitations question. To them, the FmHA's ability to foreclose after the remedy on their underlying debt has been time-barred presents an issue of substantive state property rights, which flows from Mississippi's subscription to the lien theory of mortgages. In Mississippi, as in several other states, "where a debt is barred, the mortgage cannot be enforced." *Musser v. First National Bank of Corinth,* 165 Miss. 873, 147 So. 783, 784 (1933). The lien is incident to the debt and does not stand separately. *See* GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES 608-12 (2d ed. 1970) (discussing intricacies of "lien theory" and "title theory"). Many other states, by contrast, have adhered to the title theory of mortgages, which has evolved over the years to hold that a lien does survive notwithstanding the expiration of the period for recovery on the debt. Property law varies considerably from state to state on this issue. Federal law ought to and does ordinarily rely on state law to define the incidents of real property ownership for purposes of implementing federal loan programs. *Foster v. United States,* 221 Ct.Cl. 412, 607 F.2d 943, 948 (1979) ("[I]n determining the nature of the property rights created by a conveyance . . . courts have applied the law of the situs of the real property involved"). The Muirheads conclude that, as *O'Melveny* put it, the circumstances under which FmHA's foreclosure may be barred by the expiration of the underlying debt do not constitute one of the "unusual" cases in which judicial creation of a specific "federal common law" rule "would be justified." —— U.S. at ——, 114 S.Ct. at 2055.

For several reasons, we concur in the government's characterization of the case. First, while the lien extinc-

tion argument advanced by the appellants has surface appeal, the statute on which they must rely more clearly supports the government's position. Found in chapter 15 of the Mississippi Code, entitled "Limitations of Actions," § 15-1-21 provides in relevant part:

> When a mortgage or deed of trust shall be given on real or personal estate, or when a lien shall be given by law, to secure the payment of a sum of money specified in any writing, an action or suit or other proceedings shall not be brought or had upon such lien, mortgage, or deed of trust to recover the sum of money so secured except within the time that may be allowed for the commencement of an action at law upon the writing in which the sum of money secured by such lien, mortgage, or deed of trust may be specified.

This statute reads like a statute of limitations: it forecloses an action or proceedings to enforce a lien not brought within the time for commencing a suit on the debt involved.

Second, to the extent the Muirheads concede that federal law, 28 U.S.C. § 2415(a), prescribes the limitation period for suit on FmHA's debt, even as to the application of § 15-1-21 they inferentially concede that some general federal law bears upon the limitation period governing the agency's action to foreclose its mortgage. Absent a specific federal limitation,[5] the thus-far unwavering federal rule exempting the federal government from statutes of limitations other than those enacted by Congress readily steps into this breach.

Third, every federal appellate court that has addressed whether there is a time bar on federal agencies' pursuit of real property foreclosure actions has agreed with the FmHA's position and has concluded that no such bar

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[5] 28 U.S.C. § 2415(c) does not apply to actions to foreclose mortgages.

exists. *Supra* n. 3. This includes one decision, not analyzed by appellants, originating from Oklahoma, a lien theory state. *United States v. Ward,* 985 F.2d 500 (10th Cir.1993).

Consequently, as the Muirheads must rely on an unabashed state statute of limitations, while venerable federal caselaw and the uniform rule among the circuit courts of appeals hold that no state limitations period, and specifically none governing foreclosures, is effective against the federal government, their appeal cannot succeed.

But although present authority compels acceptance of FmHA's position, we are troubled by the federal government's insistence that it may enforce ancient mortgages outstanding in numerous, long-lived and often default-prone federal lending programs essentially forever. The continued existence of these mortgages may cloud titles to property all over the country, and in so doing will engender confusion, higher real property transaction costs, and commercial instability. If federal agencies simply conformed their lending practices to the dictates of state law, as every private lender must, they would act more promptly upon defaulted mortgages and would not prejudice the alienability of reality.

The government's central proposition—that limitations may not run against the sovereign—seems quite inappropriate in the context of federal loan programs. In *Kimbell Foods, supra,* the Supreme Court devised a three-part test for determining when a federal rule of decision should supplant state law in cases involving federal loans. Courts must consider whether uniform national administration of the federal program is necessary, whether use of a state law rule will frustrate the federal objective, and whether a federal common law rule might disrupt commercial expectations founded upon state law. In *Kimbell Foods,* the pleas by FmHA and SBA for "uniformity," "protecting the federal fisc," and "ease of administra-

tion" were unanimously rejected in favor of maintaining stability and predictability in local commercial law. The Supreme Court understood that superimposing on state commercial law special federal rules to govern lien priorities arising from federal loan programs would become hopelessly complex and would ultimately have adverse economic effects.

Similarly, in *United States v. Yazell,* 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), the Court recognized an important federal policy to preserve the integrity of state family law and property relationships, which it held must prevail over SBA's desire for agency-favoring federal common law rules of decision. *Yazell* commented, in regard to the SBA loan program, that there was no specific need for uniformity, no problem in complying with state law, and in fact, SBA's compliance manual already carefully conformed its loans to the requirements of state law. 382 U.S. at 357, 86 S.Ct. at 509.[6] Most recently, in *O'Melveny,* the Court seems to suggest that only when there is outright conflict between federal law and state law regarding a federal regulatory scheme must state law be displaced. —— U.S. at ——, 114 S.Ct. at 2055. Apart from the *Summerlin* principle, there is, as clearly evident in *Kimbell* and *Yazell,* no ground for conflict between state and federal rules of decision regarding the enforceability of government-backed mortgages.

Contrary to the commercial realism prominent in all of these cases, the ancient attribute of sovereignty asserted by the federal government is far more appropriate to essential sovereign functions than to the federal government's role as a lender to veterans, small business owners, farmers, and disaster victims among others. That the attribute is ancient does not make it sensibly applicable

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[6] Surely the national interest in maintaining the consistency of state real property law is as great as the policy at stake in *Yazell,* and the inconvenience to SBA or FmHA of fully and timely complying with state law is just as small.

to the government's role in commercial transactions. In fact, doing away with limitations periods on a significant number of mortgage foreclosures takes a giant step backwards from the standpoint of public policy concerns for fairness and economic efficiency. Nearly every state has enacted laws to prevent the disruption of commerce in real property caused by the existence of ancient mortgages.[7] In short, *Summerlin* and related cases ought to be reconsidered insofar as they hold that state statutes of limitations may not be applied to the government's real property foreclosure actions arising from federal loan programs. Alternatively, Congress should amend 28 U.S.C. § 2415 expressly to so provide.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[7] *See* GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES 621-23 (2d ed. 1970) (describing emerging trend of states to create "ancient mortgage" statutes allowing one to merely check the record and refer to a calendar to determine whether a very old mortgage continues to cloud title).

APPENDIX B

[Filed Apr. 26, 1993]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J91-0585(L)(C)

UNITED STATES OF AMERICA, ACTING ON BEHALF OF FARMERS HOME ADMINISTRATION,
Plaintiff

VS.

JAMES I. MUIRHEAD AND HIS WIFE, LUCILLE MUIRHEAD, *et al.*,
Defendants

MEMORANDUM OPINION AND ORDER

The United States of America, acting on behalf of the Farmers Home Administration (FmHA), brought this action for reformation of a certain deed of trust executed by James I. Muirhead, Lucille Muirhead, Robert E. Muirhead and Glenda Muirhead, d/b/a Timberlane Ranch, in favor of FmHA on certain real property located in Simpson County, Mississippi. The Muirheads counterclaimed against FmHA contending that the deed of trust upon which this action was brought, as well as a number of other deeds of trust executed by the Muirheads in favor of FmHA, are void and unenforceable since the statute of limitations has run on the underlying debts. The Muirheads asked that the court order FmHA to cancel the deeds of trust on the land records and further requested an order setting aside FmHA's foreclosure sales of properties covered by the deeds of trust.

This cause is presently before the court on the motion of FmHA for summary judgment and to dismiss amended counterclaim. A response to the motion has been filed by the Muirheads, and defendant Deposit Guaranty National Bank (Depost Guaranty) has separately responded to the motion. Having considered the motion and responses filed by these defendants, the court concludes that FmHA's motion is well taken and should be granted.

FACTS AND PROCEEDINGS

During 1979 and 1980, various of the Muirhead defendants executed promissory notes in favor of FmHA, which notes were secured by several deeds of trust on properties located in Copiah, Rankin, Hinds and Simpson counties in Mississippi.[1] On April 2, 1982 and April 13, 1982, FmHA sent the Muirheads notices of acceleration and demand for payment on all of the promissory notes, declaring the notes "immediately due and payable." On April 16, 1982, a few days after the notices were sent, the Muirhead defendants filed a Chapter 11 bankruptcy proceeding which was converted to a Chapter 7 proceeding the following year. Though FmHA obtained

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[1] The Muirheads executed promissory notes in favor of FmHA, as follows:

September 27, 1979	$1,150,000
September 27, 1979	143,000
September 27, 1979	57,000
April 10, 1980	110,000
April 21, 1980	116,350

The notes were secured by deeds of trust on various parcels of real property, as follows:

September 27, 1979	Rankin
September 27, 1979	Simpson
September 27, 1979	Hinds
September 27, 1979	Copiah
April 21, 1981	Rankin
April 21, 1981	Simpson
April 21, 1981	Hinds
April 21, 1981	Copiah

an order from the bankruptcy court on July 19, 1993 lifting the automatic stay of 11 U.S.C. § 362 as to FmHA, FmHA took no action with respect to the Muirheads' indebtedness until May 20, 1985, when FmHA sent a second notice of acceleration and demand for payment. Thereafter, FmHA did nothing more until October 1991, when it began preparing to initiate foreclosure proceedings with respect to the real property covered by the deeds of trust.

In furtherance of its efforts to foreclose on the deeds of trust executed by the Muirheads, FmHA filed the present action on October 9, 1991 seeking reformation of one of the deeds of trust, covering property located in Simpson County, contending that the legal description of two of the parcels of property, as set forth in the instrument, contained scrivener's errors which prevented FmHA from foreclosing as to those parcels. FmHA named as defendants the Muirheads, as well as various entities holding liens against the property, including Deposit Guaranty. In their answer to the complaint, the Muirheads denied that FmHA was entitled to reformation of the Simpson County property deed of trust and claimed, additionally, that none of the deeds of trust were enforceable since the underlying indebtednesses were barred as a result of the running of the statute of limitations. Additionally, by way of a counterclaim, they sought an adjudication that the deeds of trust were barred and unenforceable, together with a judgment requiring the FmHA to cancel the deeds of trust on the land records.

A foreclosure sale was conducted as to all but the Simpson County deed of trust on November 26, 1991.[2] FmHA purchased the property covered by all but one of the

[2] After this action was filed, the Muirheads sought and were granted a temporary restraining order enjoining FmHA from proceeding with foreclosure of any of the deeds of trust. As they were unable to raise the required bond, the foreclosure proceeded as scheduled.

deeds of trust, and the Rankin County property covered by that deed of trust was purchased by Sea Lands, Ltd. After the properties were sold, save the two parcels that were the subject of FmHA's complaint, the Muirheads amended their counterclaim and filed a third-party complaint against Sea Lands demanding that the sales be set aside based on their contention that the sales were wrongful and void since the underlying deeds of trust were no longer valid and enforceable.

FMHA'S MOTION TO DISMISS MUIRHEADS' COUNTERCLAIM

It is undisputed that the statute of limitations applicable to the promissory notes executed by the Muirheads is 28 U.S.C. § 2415(a), which establishes a six-year limitation for "every action for money damages brought by the United States or any officer or agency thereof which is founded on any contract." According to the Muirheads, this six-year limitations period on the notes expired on or about July 5, 1989.[3] The issue presented by the Muir-

[3] The Muirheads' computation is derived as follows: The notes to FmHA became fully due and payable and thus the applicable statute of limitations began to run on April 2 and April 13, 1982, when the government first gave notice of acceleration and demanded immediate payment. *See Nyhus v. Travel Mgmt. Corp.*, 466 F.2d 440 (D.C. Cir. 1972). Therefore, they contend that after excepting from the limitations period the time during which the bankruptcy stay was in place (April 16, 1982 through July 19, 1983), *see In re Hunters Run, Ltd. Partnership*, 875 F.2d 1425 (9th Cir. 1989) (automatic stay tolls statute of limitations), the six-year time limitation lapsed on or about July 5, 1989.

FmHA disputes the Muirheads' calculation and contends, instead, that while the six-year limitations period did begin to run on April 2 and April 13, 1982, the tolling of the limitations period as a result of the bankruptcy stay continued beyond July 19, 1983, the date the stay was lifted, until May 20, 1985, because FmHA took no action until that time to reaccelerate the Muirheads' indebtedness. Further, according to FmHA, the limitations period was tolled from May 7, 1987 until December 28, 1988, as a result of an injunction against FmHA foreclosures and accelerations issued

heads' counterclaim, and by FmHA's motion to dismiss the counterclaim, is whether FmHA is barred from exercising its foreclosure rights under the deeds of trust since it is time-barred from maintaining an action on the notes evidencing the underlying debts.

As indicated, defendants maintain that FmHA is barred by the running of the applicable statute of limitations from filing an action against them on the promissory notes for which the deeds of trust stand as security and that, because FmHA is barred from maintaining any action against them on the underlying indebtednesses, so, too, is it barred from foreclosing against the deeds of trust. They contend that since there is no federal statutory rule governing whether a deed of trust survives the extinguishment of the underlying debt by the passing of the period of limitations, this court must fashion federal common law to resolve the issue and that in so doing, the court should adopt Mississippi law as the federal rule of decision. And, since under Mississippi law, the right and remedy on a deed of trust do not survive the running of the statute of limitations on the underlying indebtedness,[4] they reason that the deeds of trust at issue here

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by the district court in *Coleman v. Block*, 663 F. Supp. 1315 (D.N.D. 1987). Under this computation, the limitations period had not expired at the time this suit was filed.

In the court's view, it is likely that neither party is correct in its analysis of this issue. However, because the court concludes that irrespective of the running of the limitations period on the underlying notes, FmHA is not barred from exercising its foreclosure rights, the court need not determine when, or if, the limitations period on the notes expired. The court simply assumes for purposes of deciding FmHA's motion that it expired prior to the date suit was filed.

[4] *See Musser v. First Nat'l Bank of Corinth*, 147 So. 783, 784 (Miss. 1933) ("Where a debt is barred, the mortgage cannot be enforced."); Miss. Code Ann. § 15-1-21 (1972) ("in all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred.").

became void and unenforceable when the statute of limitations expired on the promissory notes.

The court cannot accept the Muirheads' position. It is universally accepted that "the United States is not subject to any statute of limitations unless Congress has expressly provided otherwise," *United States v. Matthews*, No. 86-CV-3645, 1988 WL 76567, at *1 (E.D.N.Y. 1988) (citing *United States v. Podell*, 572 F.2d 31, 35 n.7 (2d. Cir. 1978), and *United States v. Summerlin*, 310 U.S. 414, 416-17 (1940)), and that, with respect to actions by the government to foreclose mortgages or deeds of trust, Congress has not provided any limitations period, under § 2415(a) or elsewhere, *id.* *See also United States v. Ward*, No. 92-7068 (10th Cir. Feb. 8, 1993) (no time limitation exists on government's enforcement of mortgage; "2415(a) may cut off a civil action on a note, but the government may still foreclose on the mortgage securing the debt."); *United States v. Succession of Siddon*, 812 F. Supp. 674, 676 (W.D. La. 1993) ("The administrator argues that the action to recover on the underlying notes has prescribed under § 2415(a) and thus the action to foreclose on the mortgages, because of its accessorial nature, must fall as well. La.Civ.Code. Ann. art. 3411(3). . . . We . . . hold that the plaintiff's right to foreclose on the mortgage is not prescribed under § 2415(a)."); *Westnau Land Corp. v. United States Small Bus. Admin.*, 785 F. Supp. 41, 43 (E.D.N.Y. 1992) (right to foreclose on mortgage is distinct from right to bring action for money damages on the note representing the debt and no federal statute of limitations applies to actions to foreclose a mortgage); *United States v. Freidus*, 769 F. Supp. 1266, 1273 (S.D.N.Y. 1991) (mortgage foreclosure actions brought by federal government are not governed by § 2415(a)); *United States Small Bus. Admin. v. Edwards*, 765 F. Supp. 1215, 1222 (M.D. Pa. 1991) (though Small Business Administration's claim for money damages on note was time-barred, "the SBA's action insofar as it seeks to foreclose on property secur-

ing debt [was] not time-barred"); *United States v. Copper*, 709 F. Supp. 905, 908 (N.D. Iowa 1988) (while § 2415 (a) "bars government from bringing a civil action to enforce defendants' debt[,] . . . the statute in no way limits the government's right to foreclose a mortgage given to secure said debt."); *Gerrard v. United States Office of Educ.*, 656 F. Supp. 570, 574 (N.D. Cal. 1987) ("Section 2415(a) . . . cuts off the remedy of a civil action on a debt brought by the government, but leaves open many other means of enforcing the government's right," including foreclosure of the mortgage securing the debt.); *Curry v. United States Small Bus. Admin.*, 679 F. Supp. 966, 970 (N.D. Cal. 1987) (statute of limitations of § 2415(a) will not bar foreclosure action); *Cracco v. Cox*, 414 N.Y.S.2d 404, 406, 66 A.D. 447 (1979) ("Nowhere is there an indication that subdivision (a) of section 2415 is to apply to any [type of action than actions for money damages based on contract] or that it was intended to effect a sweeping change in the general rule that limitation periods do not govern actions brought by the United States").

Further, though recognizing that state law may be utilized where federal law controls an issue but does not address that issue, the courts have concluded, almost without exception, that state law will not be resorted to in order to provide the rule of decision on this limitations issue:

> The general rule is that the rights of the United States under . . . federal . . . program[s] are governed by federal law. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). Where federal statutes or laws do not delineate these rights, the federal courts must "fill the interstices of federal legislation 'according to their own standards.'" *Id.* at 727 (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). In this case, there is no vacuum to fill because the ancient rule that the

> United States is not subject to a limitations period clearly addresses the issue presented.

Matthews, 1988 76567 WL, at 1. In other words, given the longstanding federal rule that the United States is not subject to any limitations period unless Congress has expressly provided otherwise, it cannot be said that federal law is silent on this issue. And since federal law does address the issue, there is no cause to resort to state law for an answer. *See United States v. Ward*, No. 92-7068 ("[B]ecause the underlying loans were made . . . by the [FmHA] . . . and emanated from the Farm and Rural Development Act of 1949, a nationwide federal program, the government is not affected by Oklahoma's lien expiration law. . . . Thus, if the government is barred from the enforcement of the mortgage, the limitation must come from federal law. No such limitation exists."); *Westnau Land Corp.*, 785 F. Supp. at 43 (state's statute of limitations on mortgage foreclosure actions did not bar government from seeking to foreclose since federal law applied); *Copper*, 709 F. Supp. at 907 (finding Iowa rule inapplicable to Small Business Administration's foreclosure action against property mortgaged by defendants); *Gerrard*, 656 F. Supp. at 574-75 (rejecting contention that state statute of limitations barred action; "The United States . . . is not subject to state statutes of limitations.").

This court is in agreement with the conclusions reached by these courts and, accordingly, holds that though FmHA may have become barred by the six-year statute of limitations of § 2415(a) from maintaining an action against the Muirheads on the promissory notes evidencing their underlying debts, the FmHA's right to foreclose the deeds of trust was nevertheless preserved by federal law.[5] It

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[5] The court has been provided a copy of the district court's opinion in *Hines v. United States, Farmers Home Admin.*, No. 2:90-0683-15 (D.S.C. 1991), in which the court reached a contrary conclusion. However, inasmuch as the *Hines* opinion was subse-

follows that the Muirheads' counterclaim against FmHA, being predicated solely on their contention that the FmHA was barred from foreclosing by virtue of the limitations bar against proceeding on the underlying notes, cannot survive FmHA's motion to dismiss.

THIRD-PARTY COMPLAINT AGAINST SEA LANDS

By their third-party complaint against Sea Lands, the Muirheads seek to have set aside the foreclosure sale at which Sea Lands purchased certain of the Muirhead property. As the court has concluded that the counterclaim must be dismissed and as the third-party complaint is based on the same theory and arguments as the Muirheads' counterclaim against FmH, the third-party complaint is due to be dismissed as well.

DEPOSIT GUARANTY'S RESPONSE

Depost Guaranty, which was named as a defendant in this action because it holds a judgment lien against the property covered by FmHA's deeds of trust,[6] has responded in opposition to FmHA's motion to dismiss and for summary judgment.[7] In its response, Deposit Guar-

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quently rescinded and vacated by the court which issued it, the opinion is of little, if any, precedential value.

[6] Deposit Guaranty obtained a judgment against James Muirhead in the amount of $63,000 on March 2, 1987 and enrolled its judgment in Rankin, Simpson, Copiah and Hinds Counties.

[7] FmHA has moved to strike Deposit Guaranty's response on the basis that Deposit Guaranty lacks standing to either object to or consent to the relief sought by FmHA's motion. Earlier in this action, the magistrate judge denied a motion by Deposit Guaranty for leave to amend to assert a counterclaim against FmHA and that ruling by the magistrate is the subject of an appeal by Deposit Guaranty. The court cannot conclude that the magistrate judge's decision was clearly erroneous or contrary to law. However, the court is of the view that even though Deposit Guaranty was not permitted to file its counterclaims, it nevertheless has a sufficient

anty insists that the primary issue in this case insofar as Deposit Guaranty is concerned is not whether a statute of limitations has run, but rather concerns relative lien priorities. The issue, according to this defendant, is whether or not FmHA still has a lien on the Muirhead properties with respect to other existing or potential creditors who also have lien rights in the properties.

Deposit Guaranty acknowledges that if FmHA has a valid lien against the properties, then FmHA's lien is superior to that of Deposit Guaranty.[8] It argues, though, that if the statute of limitations has run so as to bar FmHA's right to foreclose or enforce its lien, then the liens created by FmHA's deeds of trust have ceased to exist and FmHA has no valid lien against the property and certainly no lien priority. From this position, DGNB reasons that because the issue is whether FmHA had a valid lien on the properties at the time of foreclosure—or as to the Simpson County properties whether it retains a valid lien—the court must look to state law to determine whether the statute of limitations has run, and that under Mississippi law, the expiration of the limitations period as to the promissory notes operates to bar FmHA from foreclosing on the deeds of trust.

In the court's opinion, Deposit Guaranty's characterization of the issue as one of lien priorities rather than of limitations is a misguided attempt to avoid the precise result which the court has reached with respect to the Muirheads. The argument places the cart before the horse. The threshold issue which the court is called upon to resolve in this case, both as to the Muirheads *and*

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interest in the matters raised by FmHA's motion to permit the court's consideration of Deposit Guaranty's position by virtue of its status as a defendant lienholder.

[8] It appears undisputed that FmHA had a first lien against each of the subject properties and the Internal Revenue Service had the second lien position. Deposit Guaranty occupied the position of third lienholder.

as to Deposit Guaranty, is whether FmHA became time-barred from foreclosing on the deeds of trust. The lien positions of other parties, including Deposit Guaranty, would become an issue only if FmHA was barred from foreclosing. The only basis for Deposit Guaranty's challenging FmHA's lien position is its contention that FmHA was precluded from foreclosing by the running of the limitations period. It follows, therefore, that because FmHA was not barred from foreclosing, as the court has concluded *supra,* FmHA's lien position remained superior to Deposit Guaranty's.

Even if the court were to treat the issue vis-a-vis Deposit Guaranty as one of lien priorities, as this defendant insists it must, the court would still conclude that FmHA's motion should be granted. Deposit Guaranty argues, as did the Muirheads, that Mississippi lien law—to the effect that the liens created by FmHA's deeds of trust have expired because the underlying debt is barred by the statute of limitations—should provide the rule of decision relative to the limitations issue since there is no federal law on the subject. And though Deposit Guaranty, like the Muirheads, contends that the cases noted above which have held otherwise were wrongly decided, this defendant also contends that even if the holdings of those cases are appropriately applied to the Muirheads, they should not be applied to a lienholder, such as Deposit Guaranty. In support of this position, Deposit Guaranty cites *United States v. Kimbell Foods, Inc.,* 440 U.S. 715 (1979), in which the Supreme Court adopted state law as the appropriate federal rule for establishing the relative lien priority of competing federal and private liens. FmHA, however, forcefully, and persuasively argues that *Kimbell Foods* does not extend to the situation here presented. According to FmHA, under *Kimbell Foods,* this court would only look to Mississippi law on the statute of limitations issue if the failure to apply Mississippi law would disrupt commercial relationships with

respect to the perfection and priority of liens. No disruption would occur here if the court declined to apply Mississippi law since Deposit Guaranty, and all other lienholders, acquired liens on the property before the date on which it is contended the statute of limitations expired.

The court in *Kimbell Foods* expressed concern that application of federal law, rather than state law, might in some instances prejudice "[c]reditors who justifiably rely on state law to obtain superior liens. . . ." 440 U.S. at 739. If the government were given precedence over other commercial lenders who would otherwise be in a superior lien position when the government's lien arose, that private commercial lender's expectations could be thwarted. *Id.* In this case, Deposit Guaranty's judgment lien, perfected on March 2, 1987, placed Deposit Guaranty in the position of a third lienholder on the Muirhead properties when its judgment was enrolled. It is undisputed that at that time, the statute of limitations had not run and did not expire until sometime after Deposit Guaranty perfected its lien. Because Deposit Guaranty had never been in a superior lien position to FmHA, the concerns expressed in *Kimbell Foods* would seem to have no application. Thus, Deposit Guaranty seeks to rely, after the fact, upon the alleged running of the statute of limitations to improve, not merely protect, its lien position. *Kimbell Foods* should not be read to countenance Deposit Guaranty's interest.

MOTION FOR SUMMARY JUDGMENT

The Muirheads have conceded that if the court grants FmHA's motion to dismiss, then FmHA's motion for summary judgment on its complaint for reformation should likewise be granted.

CONCLUSION

Based on the foregoing, it is ordered that FmHA's motion to dismiss the amended counterclaim is granted. It is further ordered that the Muirheads' third-party complaint against Sea Lands be dismissed. Finally, it is ordered that FmHA's motion for summary judgment is granted.

A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

ORDERED this 23d day of April, 1993.

/s/ Tom S. Lee
United States District Judge